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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1657.

KATHERINE P. BOWE,
ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
PETITIONER,

v.

FIRST OF DENVER MORTGAGE INVESTORS ET AL.,
RESPONDENTS.

Respondents' Brief in Opposition.

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Table of Contents.

Opinions below 1

Jurisdiction 2

Counterstatement of question presented 2

Counterstatement of the case 2

Argument 4

I. The factual issues presented by the petition were correctly decided below and are too narrow to warrant review by this Court 5

II. The court's prior decision in Coopers & Lybrand v. Livesay is controlling 8

III. The decision of the Court of Appeals does not conflict with any decision of this Court 9

IV. The decision of the Court of Appeals does not conflict with any other Court of Appeals decisions 11

Conclusion 12

Table of Authorities Cited.

Cases.

Bowe v. First of Denver Mtg. Investors, 613 F.2d 798 (10th Cir. 1980) 1, 3

Bowe v. First of Denver Mtg. Investors, 562 F.2d 640 (10th Cir. 1977) 2, 3, 5

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 3, 4, 5, 6, 7, 8, 9, 11

Deposit Guaranty Nat'l Bank v. Roper, 48 U.S.L.W. 4279 (March 19, 1980) 9, 10, 11
Huey v. Teledyne Inc., 608 F.2d 1234 (9th Cir. 1979) 11
United States Parole Commission v. Geraghty, 48 U.S. L.W. 4286 (March 19, 1980) 10, 11

STATUTES AND RULES.

28 U.S.C. § 1254(a) 2
28 U.S.C. § 1291 3, 8
Securities and Exchange Act of 1934 7
Colorado Securities Act, C.R.S. 11-51-125 (1973) 7
Rule 23, Federal Rules of Civil Procedure 3

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The respondents, defendants below, submit this brief in opposition to the petition for certiorari filed by the petitioner, and respectfully request that the petition for certiorari be denied.

Opinions Below.

The judgment of the United States Court of Appeals for the Tenth Circuit (Pet. A.2) was entered on January 25, 1980, and has been reported as *Bowe* v. *First of Denver Mtg. Investors*, 613 F.2d 798. That judgment dismissed an appeal from a final judgment entered in the United States District Court for

the District of Colorado on February 9, 1978, on the ground of lack of prosecution. (See Pet. at 4). Prior to that judgment, the United States Court of Appeals for the Tenth Circuit had considered the petitioner's earlier attempt to appeal the denial of class certification by the United States District Court for the District of Colorado on March 16, 1976 (Pet. A.10); that earlier appeal was also dismissed, in an opinion reported as *Bowe* v. *First of Denver Mtg. Investors*, 562 F.2d 640 (1977).

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Counterstatement of Question Presented.

Where class certification is denied by the district court, can the named plaintiff seek appellate review of that determination as of right prior to trial on the merits, by voluntarily obtaining a final order of dismissal for failure to prosecute and asserting that dismissal must be reversed automatically on appeal if the class determination is found to be erroneous so as to permit the named plaintiff then to proceed with trial on the merits?

Counterstatement of the Case.

The petitioner's Amended Complaint, alleging federal and state securities violations, sought certification of a class. In

a hearing on the class issue petitioner, by her attorney, represented to the District Court that she was prepared to continue with the merits of the case whether or not a class were certified. The District Court denied class certification, finding, *inter alia*, that the questions presented were individual questions, not satisfying the requirements of Rule 23, because allegations of the Amended Complaint related to changing economic conditions and resulting business decisions over a wide time period "which would vary the duty of disclosure significantly" (Pet. A.12) (See Rule 23(b)(3)); that the advantages of a class proceeding would not outweigh the manageability problems involved (Pet. A.12); and that neither the requirement of "typicality" nor that of "adequate representation" (See Rule 23(a)(3), (a)(4)) was satisfied (Pet. A.12).

Petitioner sought to appeal the class decision before going forward with her individual claim. The Tenth Circuit dismissed the appeal, holding that the "death knell" exception to the finality requirement of 28 U.S.C. § 1291 did not apply because of petitioner's counsel's assurance to the trial court that she was prepared to proceed with the merits whether or not a class were certified. (See *Bowe* v. *First of Denver Mtg. Investors*, 562 F.2d 640; Pet. A.3, at n.1.)

The petitioner did not then proceed to trial of her own case on the merits, as the Tenth Circuit had contemplated. Instead she asserted that she would not try her own case, and voluntarily invited a dismissal for failure to prosecute. The District Court dismissed with prejudice on that ground, and petitioner again appealed. The Tenth Circuit again dismissed, finding petitioner's procedure a further attempt to obtain review of the class decision before trial of the merits, the very "piecemeal" appeal barred by *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (See Pet. A.8).

Argument.

The petitioner asserts in her Introduction (Pet. 5), that because her individual claim is small, "without the benefit of a class action she cannot obtain the legal services and resources necessary to prove her allegations and obtain relief" and that the decision below "denies her any opportunity to obtain review of the District Court's decision." This focus, which is the core of the petition for certiorari, itself shows why certiorari should not be granted. The petitioner is attempting to relitigate this Court's recent unanimous decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), which, in abolishing the "death knell" doctrine, rejected precisely this argument that plaintiffs could as of right appeal the class decision prior to trial. The Tenth Circuit correctly applied *Livesay*, holding that petitioner could not obtain review of the denial of class certification before proceeding to the merits as she had attempted to do.

Moreover, the record will not support petitioner's assertion that forcing her to try her own case before appealing the class decision resulted in her inability to proceed. The petitioner had assured the district court that she was willing and able to proceed on an individual basis; appellate review was initially denied for precisely that reason. In several other ways as well, see point I, *infra*, petitioner's assertions as to her inability to proceed with this particular claim (Pet. 4) are not supported by, or are clearly contradicted by, the record. Thus this case, which has turned on unusual facts, is not in any event the case in which to evaluate any general assertion that small claim plaintiffs are entitled to follow the petitioner's novel path to permit appeal of class denial before proceeding with trial on the merits of the individual claim.

I. The Factual Issues Presented by the Petition were Correctly Decided Below and are too Narrow to Warrant Review by This Court.

The petitioner's argument makes clear that she is objecting to the requirement that denial of class certification by the District Court cannot be appealed until after trial of her own case on the merits. The petitioner says that this rule leaves her without any opportunity for review at all (Pet. 5), and that her lawyers (and all others) will not proceed further with her case without a class, so that she cannot prosecute her own claim (Pet. 4). Aside from the fact that this rule is imposed by this Court's own recent decision in *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. 463, see point II, *infra*, this petitioner cannot plausibly present that argument for review; her own asserted inability to proceed is contradicted by the record in several ways that make this an atypical case, with no general precedent value.

First, this petitioner assured the District Court that she would pursue her claim regardless of class certification. See *Bowe* v. *First of Denver Mtg. Investors*, 562 F.2d 640, 643:

> In the case at bar, there is an affirmative showing in the trial court record (even though at oral argument counsel for Bowe represented otherwise) that Bowe would proceed with her suit without a class certification:
>
> THE COURT: Without a Class action certification, and I'm not prejudging the Class action certification, is your client prepared to go ahead with this litigation?
> MR. PLOTKIN: Yes, Your Honor.
> THE COURT: Without a Class action certification?
> MR. PLOTKIN: Yes, she is prepared. . . .

This was the reason her "death knell" appeal, prior to the *Livesay* decision, was not permitted by the Tenth Circuit.

Second, the petitioner now asserts (Pet. 4) that her fee agreement was contingent upon success, and that because her own recovery would be small no qualified counsel would continue with her individual claim. But the record in this case is completely void of any evidence concerning her fee arrangements. Indeed the following interrogatory was propounded by the defendants to the plaintiff:

> 61. Have you agreed to any fee arrangement with any person concerning the handling of this lawsuit?

The defendants received an objection to this interrogatory as follows:

> Plaintiff objects to the following interrogatories on the ground that they concern matters which are not relevant to the subject matter involved in this action, are not discoverable on any basis and, with respect to many of such interrogatories, appear to have been designed to annoy or harass plaintiff: . . 61 . . .

Third, the record contradicts in other ways the statement that petitioner was unable to secure any other qualified counsel to proceed with trial of her case. This assertion is both suspect in general and an inappropriate basis in this particular case to present an issue worthy of this Court's consideration. In general, even if attorneys are willing to consider such cases only when there is a possibility of ultimate class-wide recovery, that possibility still exists after an initial class denial. If counsel believe that the District Court was clearly wrong in

denying class certification, they must believe the class ruling can ultimately be reversed and a class certified, so that recovery can be obtained for the class by appeal at the proper time. After initial denial of class certification a plaintiff obviously proceeds with the risk that no class-wide recovery will occur, but similar risks obtain in much individual contingency litigation, where no recovery is certain until after trial and appeal. When this Court held in *Livesay* that the "death knell" doctrine was improper, it noted that its decision did not make pursuit of such actions impossible. See 437 U.S. at 470 & n.15:

> The litigation will often survive an adverse class determination. What effect the economic disincentives created by an interlocutory order may have on the fate of any litigation will depend on a variety of factors[15] . . .

---

[15] E.g., the plaintiff's resources; the size of his claim and his subjective willingness to finance prosecution of the claim; the probable cost of the litigation and the possibility of joining others who will share that cost; and the prospect of prevailing on the merits and reversing an order denying class certification.

In any event such an assertion makes no sense on this particular record. The petitioner asserts, for example, that it was impossible to find counsel to pursue the individual case because attorneys' fees are not recoverable under the Securities and Exchange Act of 1934 (Pet. 7). This argument conveniently neglects the fact that Count IV of the Amended Complaint alleges a violation of the Colorado Securities Act, which explicitly authorizes an award of attorneys' fees (C.R.S. 11-51-125 (1973)). Attorneys' fees are designed to make possible the continued prosecution of an individual case, as petitioner's argument assumes, but such a provision *was* present in this case.

Moreover, the record will not permit the petitioner's assertion (Pet. 4) concerning the "enormous amount of time and effort" that would be imposed upon her counsel in prosecuting this litigation. Her attorney told the District Court:

> MR. PLOTKIN: . . . But I would submit, respectfully, Your Honor, that it is not a particularly complex case, nor is discovery relating to it particularly complex. On the contrary, it is relatively a simple case as we see it. (Tr. 12, July 21, 1975).

Thus in a number of ways the particular facts here make this case an inappropriate vehicle for this Court to reconsider the general problem the petitioner purports to set out: the options open to a small claim plaintiff who must try the merits before appealing a class certification denial.

II. The Court's Prior Decision in *Coopers & Lybrand* v. *Livesay* Is Controlling.

The petitioner sought to declare the case "finally" over by refusing to prosecute her own claim, to have a "final judgment" entered against her (as a matter of form only), and to appeal the class issue under 28 U.S.C. § 1291. Further, she argued below, if victorious on the class issue she had a right to return to the District Court to prosecute her claim on the merits *as though there had been no final judgment on that claim*, since the dismissal of that claim, having been "caused" by the class denial, would also be automatically reversed. The petitioner thus asserted she could create an artificial (i.e., nonbinding) "finality" on the merits, solely for the purpose of triggering the proper time to appeal the class question in advance

of the real determination on the merits. Thus the petitioner tried to assert that she could, as of right, appeal the adverse class decision first, then proceed to trial on the merits. But this is exactly the "piecemeal" litigation forbidden by *Livesay*. The Tenth Circuit saw as much, and rejected this procedure. To hold otherwise would permit a plaintiff, by such voluntary action, to accomplish piecemeal appeal in *every* case simply by refusal to proceed with the merits as *Livesay* contemplated. The result would be a rule far more lax even than the "death knell" doctrine (Pet., at A. 8); the *Livesay* rule would be completely avoided at any plaintiff's option. Petitioner was thus trying to overturn *Livesay*, or evade it, and the petition should be denied on the basis of the *Livesay* opinion.

III. The Decision of the Court of Appeals Does not Conflict with any Decision of This Court.

The two recent decisions of this Court cited by the petitioner deal with a different problem than the one presented by this petition. In *Deposit Guaranty National Bank* v. *Roper*, 48 U.S.L.W. 4279 (March 19, 1980), the plaintiffs were tendered the full amount owed by the defendant, in effect a victory in the individual case without trial (and a move obviously designed to make sure no one was left to pursue the class action). This Court summarized the issue as follows:

> We granted certiorari to decide whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case and terminates their right to appeal the denial of class certification. 48 U.S.L.W. at 4280.

The Court stated:

> . . . to deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration . . ., *id.* at 4283,

and concluded that the judgment "did not moot" the case or controversy and that the named plaintiffs retained standing to appeal the class denial. *Id.*[1]

In *United States Parole Commission* v. *Geraghty*, 48 U.S.L.W. 4296 (March 19, 1980), the individual's challenge to parole board procedures was mooted once the individual plaintiff was no longer in custody; again the Court found that standing to appeal the class decision remained.

In *Roper* and *Geraghty* the Court thus permitted individual plaintiffs, despite objections to their continued *standing* after a genuine end to their own disputes on the merits, to pursue the class questions on appeal. *Livesay* was not overturned by *Roper* and *Geraghty*. Rather, they take the *Livesay* rule — trial or other true disposition of the merits first, and then appeal of all issues including the class decision — as correct and then simply insure that the later appeal can be prosecuted. See, e.g., *Roper*, *supra*, 48 U.S.L.W. at 4282, 4283 ("appealability . . . *after* final judgment on the merits"). Those decisions in effect insure that the timing requirements specified in *Livesay* constitute a workable system; if a plaintiff does resolve the merits of his own case, he will still retain standing to appeal the class question at the proper time, after

[1] The factual difference between *Roper* and the instant case could not be clearer. Here, by Order dated February 9, 1978, the District Court dismissed the action reciting that plaintiff *conceded* that the case should be dismissed for want of prosecution.

that resolution. The problem in this case is a different one: the petitioner tried to create a judgment "final" in form but with no final or binding effect in substance in order to appeal the class issue prematurely, not at the end of the case but at the beginning. The issue was finality and piecemeal appeal, the issue addressed by *Livesay*, see section II, *supra*, not continued standing to appeal the class decision at the proper time. The opinion below is not inconsistent with *Roper* and *Geraghty*, which have not disturbed *Livesay's* prohibition of piecemeal review.

IV. The Decision of the Court of Appeals Does not Conflict with any Other Court of Appeals Decisions.

The petitioner has not asserted that the opinion below conflicts with the law in other circuits. Indeed the only other Court of Appeals case on the issue reached the same conclusion the Tenth Circuit arrived at here. *Huey* v. *Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979).

Conclusion.

For the reasons given herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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